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CITY AND COUNTY OF SAN FRANCISCO,  
LADRON DURIO, AND JAMES MOORE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GLADYS DEWITT,

Plaintiff,

vs.

CITY AND COUNTY OF SAN  
FRANCISCO, SAN FRANCISCO  
GENERAL HOSPITAL, LADRON  
DURIO, JAMES MOORE, and DOES 1 –  
25,

Defendants.

Case No. 07-3791 PJH

**[PROPOSED] ORDER GRANTING  
DEFENDANTS CITY AND COUNTY OF  
SAN FRANCISCO AND LADRON  
DURIO'S MOTION TO DISMISS**

Hearing Date: November 7, 2007  
Time: 9:00 a.m.  
Place: Courtroom 3, 17<sup>th</sup> Fl

Trial Date: Not yet set

1 The motion of Defendants City and County of San Francisco and Ladron Durio to  
 2 dismiss came on for hearing before this Court on November 7, 2007. Deputy City Attorney  
 3 Rose-Ellen H. Fairgrieve appeared as attorney for Defendants City and County of San Francisco  
 4 and Ladron Durio, and Darryl Parker, Esq. appeared for Plaintiff Gladys DeWitt.

5 After considering the moving and opposition papers, the arguments of counsel, and all  
 6 other matters presented to the Court,

7 **IT IS HEREBY ORDERED**

8 That Defendants' Motion to Dismiss BE AND IS GRANTED.

9 This order is made based solely on admissible and relevant evidence.

10 Plaintiff's First through Fifth Causes of Action for: constructive discharge in breach of  
 11 public policy; promissory estoppel; fraud; intentional infliction of emotional distress, and  
 12 negligent infliction of emotional distress, are dismissed because Plaintiff failed to file a timely  
 13 government claim, as required by California Government Code Sections 911.2 and 911.4.  
 14 Pursuant to those Sections, a plaintiff must file a California tort claim within six months or, in  
 15 the event of late claim relief, within one year of the date the injury incurred as a result of  
 16 defendant's wrongful act or omission. Plaintiff filed her tort claim on March 20, 2006. As is  
 17 apparent from the face of the allegations, each of the acts that Defendants are alleged to have  
 18 committed, as well as DeWitt's speech for which she was allegedly retaliated against, occurred  
 19 more than two years before September 20, 2005. Accordingly, her government claim to the City  
 20 was not timely as to those allegations.

21 Plaintiff's Second Cause of Action for promissory estoppel is also barred because as a  
 22 public employee Plaintiff may not, as a matter of law, assert contract or quasi-contract claims.  
 23 (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432-35.)

24 Plaintiff's Third Cause of Action for fraud against the City also fails because the City is  
 25 immune from liability for misrepresentation under California Government Code Section 818.8.  
 26 (*Burden v. County of Santa Clara* (2000) 81 Cal.App.4<sup>th</sup> 244, 250.)

27 Plaintiff's Fourth and Fifth Causes of Action for intentional and negligent infliction of  
 28 emotional distress also fail as a matter of law because they are barred by Workers' Compensation

1 Act exclusivity. Generally, an employee whose injury arises out of and in the course of  
2 employment is limited to recovery of workers' compensation benefits. (Labor Code §§ 3600-  
3 3602.) "Section 3600 of the Labor Code provides that an employer is liable for injuries to its  
4 employees arising out of and in the course of employment, and section [3602] declares that  
5 where the conditions of workers' compensation exist, the right to recover such compensation is  
6 the exclusive remedy against an employer for injury or death of an employee." (*Vuillemainroy v.*  
7 *American Rock & Asphalt, Inc.* (1999) 70 Cal.App.4<sup>th</sup> 1280, 1283.) These provisions apply to all  
8 injuries that arise from the employment relationship. (*Livitsanos v. Superior Court* (1992) 2  
9 Cal.4<sup>th</sup> 744, 747.)

10 Where, as here, "the complaint affirmatively alleges facts indicating coverage by the  
11 workers' compensation laws, if it fails to state additional facts negating application of the  
12 exclusive remedy provision, no civil action will lie and the complaint is subject to a general  
13 demurrer." (*Halliman v. Los Angeles Unified School Dist.* (1984) 163 Cal.App.3d 46, 50.)

14 Plaintiff's allegations arise out of and in the course of employment, and thus her fourth  
15 and fifth causes of action are barred as a matter of law under Workers' Compensation exclusivity.

16 Plaintiff's Sixth Cause of Action for violation for civil rights based on First Amendment  
17 speech is barred as a matter of law by the statute of limitations. California's personal injury two-  
18 year statute of limitations governs 42 U.S.C. §1983 claims for actions arising after January 1,  
19 2003. (*Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. 2007).) The alleged events giving  
20 rise to DeWitt's discrimination claims occurred, at the latest, March 29, 2003. DeWitt, however,  
21 did not file her original complaint until January 9, 2007. Therefore, DeWitt's Section 1983 claim  
22 is barred by the statute of limitations.

23 Plaintiff's Sixth Cause of Action against the City is also barred as a matter of law  
24 because, in order to state a claim for a Section 1983 violation against the City, DeWitt must  
25 allege that there was unconstitutional conduct that was proximately caused by a custom, practice  
26 or policy of the City. (*Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).)  
27 DeWitt fails to allege any facts that show the City had a policy, custom or practice of chilling  
28

1 free speech. DeWitt also does not allege that an official with final policy-making authority  
2 committed or ratified a constitutional tort against her.

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4  
5 **IT IS SO ORDERED.**

6  
7 Dated: \_\_\_\_\_

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8 Hon. Phyllis J. Hamilton  
9 United States District Judge, Northern District  
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